

A Cendana Konsep Sdn Bhd v Island Concept Sdn Bhd

HIGH COURT (PULAU PINANG) — ORIGINATING SUMMONS NO

B 24NCVC-46-01 OF 2013

S NANTHA BALAN JC

12 AUGUST 2013

C *Land Law — Caveats — Wrongful lodgement — Sale and purchase agreement entered between original owners and defendant — Inability to pay balance purchase price — Parties entered into second sale and purchase agreement — Demise of one of original owners — Whether agreement still in existence —*
D *Whether there was enforceable contract — Defendant entered caveat to protect interest over property — Application for order to remove caveat lodged — National Land Code s 327 — Whether defendant had caveatable interest*

E Lim Yun Cheow and Lim Yun Kwong ('the original owners') were the registered owners of the property in dispute. There were three SPAs entered between the defendant and the original owners. The purchase price under the first SPA which was executed in 2008 was RM1,069,900. Upon execution, the defendant paid RM106,990 being 10% deposit to the original owners. However, the defendant was not able to pay the balance purchase price of
F RM962,910 within the completion period and the 10% deposit of RM106,990 was forfeited by the original owners. In 2010, the original owners agreed to sell the property to the defendant at a purchase price of RM962,910 and consequently, a draft SPA in 2010 ('the second SPA') was agreed by both parties and was about to be executed. After the original owners had accepted
G the 10% deposit of RM96,291 ('the impugned sum'), Lim Yun Kwong passed away. The original owners' solicitors ('Messrs Ching Wei') wrote to the defendant's solicitors ('Messrs Ghazi & Lim') about returning of the impugned sum. However, the impugned sum never left Messrs Ching Wei's account. Whilst the children of the late Lim Yun Kwong were in the process of obtaining
H the small estate distribution order, Messrs Ching Wei wrote to Messrs Ghazi & Lim that they were not under any obligation to sell the property to the defendant. However, Messrs Ghazi & Lim had advised the defendant that there was still a valid enforceable contract between both parties and acting on that advice, the defendant entered a caveat to protect its interest over the property.
I Hence, in the present application, the plaintiff sought for an order to remove a caveat lodged by the defendant, pursuant to s 327 of the National Land Code ('NLC') as it was argued that the defendant had no caveatable interest as required under the NLC. On the other hand, the defendant submitted that the plaintiff had no locus standi to make such application. The issue that arose in

the context of the defendant's caveatable interest was whether the defendant had a valid SPA.

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Held, dismissing the application with costs of RM5,000:

- (1) There was no evidence of any misrepresentation or fraud when the purchase price was concluded at RM962,910 between the parties in 2010 in respect of the second SPA. Bearing in mind that there was certainty as to the identity of the parties, the property, the price as well as the terms and conditions of the sale, the 2010 agreement between defendant and the original owners, the second SPA was prima facie enforceable, notwithstanding that it had not been executed and was still labeled as a draft agreement. The label 'draft' would only go to form and not to the substance. Based on the evidence, there was prima facie evidence of a valid and enforceable contract for the sale of the property to the defendant which entitled the defendant to lodge a caveat to protect their rights under the second SPA (see paras 84–85).
- (2) It was clear that the defendant lodged the caveat pursuant to the second SPA and not the first SPA. It was irrelevant for the plaintiff to connect the defendant to the third SPA, when that had nothing to do with the defendant. Whilst the second SPA might well be in draft form, there was sufficient certainty as to the intention of the parties, ie that the property was to be sold to the defendant for the sum of RM 962,910 and the defendant had paid the 10% deposit of RM 96,291. There was certainty on all material terms, namely the parties, the property and the price. In any event, there was nothing to suggest that there were any significant terms or conditions that required further negotiation. It appeared that the old terms that were used under the first SPA were to apply to the second SPA (see paras 89–90).
- (3) There was evidence that after the death of one of the co-owners, the transaction as related to the second SPA went cold. Hence, there were extenuating circumstances to warrant the exercise of discretion to excuse the defendant for their inaction. In any event, they had filed the suit as at the date of the decision. Hence, the issue of non-filing of the suit became moot. It would have unfair to the defendant and inequitable if the caveat were to be removed and that the balance of convenience favored the retention of the caveat rather than its removal. The defendant had met all the criteria for the retention of the caveat and accordingly the plaintiff's application to remove the defendant's caveat was dismissed (see paras 115, 117–118).

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[Bahasa Malaysia summary]

Lim Yun Cheow dan Lim Yun Kwong ('pemilik-pemilik asal') merupakan pemilik berdaftar bagi hartanah yang dipertikaikan. Terdapat tiga perjanjian

- A jual beli ('PJB') yang dimeterai antara defendan dengan pemilik-pemilik asal. Harga belian di bawah PJB pertama dilaksanakan pada tahun 2008 adalah RM1,069,900. Atas pelaksanaannya, defendan membayar RM106,990 sebagai deposit 10% kepada pemilik-pemilik asal. Walau bagaimanapun, defendan tidak mampu membayar baki harga belian RM962,910 dalam tempoh penyempurnaan dan deposit 10% iaitu RM106,990 tersebut
- B dilupuskan oleh pemilik-pemilik asal. Pada tahun 2010, pemilik-pemilik asal bersetuju untuk menjual hartanah kepada defendan dengan harga belian sebanyak RM962,910 dan dengan itu, satu deraf PJB pada tahun 2010 ('PJB kedua') dipersetujui oleh kedua-dua pihak dan hampir dilaksanakan. Selepas
- C pemilik-pemilik asal menerima deposit 10% iaitu RM96,921 ('jumlah yang dipertikaikan'), Lim Yun Kwong meninggal dunia. Peguam-peguam kepada pemilik asal ('Messrs Ching Wei') menulis kepada peguam-peguam defendan ('Messrs Ghazi & Lim') bagi pemulangan jumlah yang dipertikaikan. Walau
- D bagaimanapun, jumlah yang dipertikaikan tidak pernah dikeluarkan dari akaun Messrs Ching Wei. Sementara anak-anak mendiang Lim Yun Kwing dalam proses untuk mendapatkan perintah pengedaran harta pusaka kecil, Messrs Ching Wei menulis kepada Messrs Ghazi & Lim bahawa mereka tidak mempunyai kewajiban untuk menjual hartanah tersebut kepada defendan.
- E Walau bagaimanapun, Messrs Ghazi & Lim menasihatkan defendan bahawa masih terdapat kontrak yang boleh dikuatkuasakan antara pihak-pihak dan bertindak atas nasihat tersebut, defendan memasukkan kaveat untuk melindungi kepentingannya ke atas hartanah. Oleh itu, dalam permohonan ini, plaintif memohon satu perintah untuk mengeluarkan kaveat yang
- F dimasukkan oleh defendan, di bawah s 327 Kanun Tanah Negara ('KTN') kerana dihujahkan bahawa defendan tidak mempunyai kepentingan yang boleh dikaveatkan seperti yang ditetapkan di bawah KTN. Sebaliknya, defendan menghujahkan bahawa plaintif mempunyai locus standi untuk membuat permohonan sedemikian. Isu yang timbul dalam konteks
- G kepentingan boleh dikaveatkan defendan adalah sama ada defendan mempunyai PJB yang sah.

Diputuskan, menolak permohonan dengan kos sebanyak RM5,000:

- H (1) Tiada keterangan mengenai salah nyata atau penipuan ketika harga belian diputuskan pada RM962,910 antara pihak-pihak dalam tahun 2010 bagi PJB kedua. Perhatikan bahawa terdapat ketentuan ke atas identiti pihak-pihak, hartanah, harga dan juga terma dan syarat jualan, perjanjian 2010 antara defendan dan pemilik-pemilik asal, PJB kedua
- I adalah secara prima facie boleh dikuatkuasakan, tanpa melihat bahawa ia belum dilaksanakan dan masih dilabelkan sebagai deraf perjanjian. Label 'deraf' hanyalah pada bentuk dan bukan pada kandungan. Berdasarkan keterangan, terdapat keterangan prima facie akan kontrak yang sah dan boleh dikuatkuasakan bagi jualan hartanah tersebut kepada defendan

yang memberikan hak kepada defendan untuk memasukkan kaveat untuk melindungi hak-haknya di bawah PJB kedua (lihat perenggan 84–85).

- (2) Adalah jelas bahawa defendan memasukkan kaveat di bawah PJB kedua dan bukan PJB pertama. Adalah tidak relevan untuk plaintif mengaitkan defendan kepada PJB ketiga, sedangkan ia tiada kena-mengena dengan defendan. Sementara PJB kedua masih dalam bentuk deraf, terdapat ketentuan yang mencukupi mengenai niat pihak-pihak, iaitu bahawa hartanah tersebut dijual kepada defendan bagi jumlah RM962,910 dan defendan telah membayar deposit 10% sebanyak RM96,291. Terdapat ketentuan pada terma-terma material, khususnya pihak-pihak, hartanah dan harga. Dalam apa jua keadaan, tidak terdapat apa-apa yang mencadangkan bahawa terdapat apa-apa terma atau syarat-syarat ketara yang memerlukan rundingan lanjut. Ia kelihatan bahawa terma-terma lama yang digunakan di bawah PJB pertama terpakai kepada PJB kedua (lihat perenggan 89–90).
- (3) Terdapat keterangan bahawa selepas kematian salah seorang pemilik bersama, transaksi berkenaan PJB kedua tidak menjadi. Oleh itu, terdapat hal keadaan peringan untuk mewajarkan budi bicara untuk memaafkan defendan bagi kesalahan tindakan mereka. Dalam apa jua keadaan, mereka telah memfailkan guaman pada tarikh keputusan. Oleh itu, isu ketidakfaihan guaman menjadi pertikaian. Adalah tidak adil kepada defendan dan tidak berekuiti jika kaveat dikeluarkan dan bahawaimbangan kebarangkalian berpihak kepada penahanan kaveat berbanding pengeluarannya. Defendan telah memenuhi kesemua kriteria bagi penahanan kaveat dan dengan itu, permohonan plaintif untuk mengeluarkan kaveat defendan ditolak (lihat perenggan 115, 117–118).]

Notes

For cases on wrongful lodgement, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2587–2592.

Cases referred to

- Chin Cheng Hong v Hameed & Ors* [1954] 1 MLJ 169; [1954] 1 LNS 7, CA (refd)
- Institut Teknologi Federal Sdn Bhd v IIUM Education Sdn Bhd* [2007] 7 MLJ 23, CA (refd)
- Jasalam (M) Sdn Bhd v Wong Koon Yee* [2000] 3 MLJ 115, CA (refd)
- Jit Kaur v Parl Singh* [1974] 2 MLJ 199 (refd)
- Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd* [1992] 1 MLJ 263; [1992] 1 CLJ 150 (Rep); [1992] 1 CLJ 20, SC (refd)
- Kundang Lakes Country Club Bhd v Garden Masters (M) Sdn Bhd* [1999] 2 MLJ 537; [1999] 2 AMR 2420, CA (refd)

- A** *Lim Ah Moi v AMS Periasamy a/l Suppiah Pillay* [1997] 3 MLJ 323, CA (refd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719;
 [1995] 3 CLJ 520, CA (refd)
Macon Engineers Sdn Bhd v Goh Hooi Yin [1976] 2 MLJ 53; [1976] 1 LNS 67
 (refd)
- B** *Mahadevan & Anor v Patel* [1975] 2 MLJ 207; [1975] 1 LNS 95, FC (refd)
Million Group Credit Sdn Bhd v Lee Shoo Khoo & Ors [1986] 1 MLJ 315 (refd)
Murugappa Chettiar Lakshmanan v Lee Teck Mook [1995] 1 MLJ 782; [1995] 2
 CLJ 545, CA (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (folld)
- C** *Paya Terubong Estates Sdn Bhd v Pusaka Warisan Sdn Bhd* [1998] 2 MLJ 463,
 CA (refd)
Sandrifarm Sdn Bhd v Pegawai Pemegang Harta Malaysia [2000] 2 MLJ 535;
 [2002] 2 AMR 1556, CA (folld)
Score Options Sdn Bhd v Mexaland Development Sdn Bhd [2012] 6 MLJ 475;
 [2012] 7 CLJ 802, FC (refd)
- D** *Tan Leng Choo & Ors v Law Teck Huat* [2009] 1 MLJ 820, CA (refd)
Wong Kuan Tan v Gambut Development Sdn Bhd [1984] 2 MLJ 113; [1984] 1
 CLJ (Rep) 441, FC (refd)
Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) & Anor v
E *Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487, CA (refd)

Legislation referred to

National Land Code ss 323(1)(a), (b), (c), 327, 327(1), Form 14A

- F** *Nicholas Tan (Lim Huck Aik) for the plaintiff.*
A Chandrasegaran (Chandra Segaran & Co) for the defendant.

S Nantha Balan JC:

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INTRODUCTION AND PRELIMINARY MATTERS

- H** [1] This an application by the plaintiff pursuant to s 327 of the National Land Code for an order to remove a caveat lodged by the defendant under private caveat presentation No 0799B2010012163 ('the caveat') on a parcel of land known as Geran (first Grade) No 39658 Lot No 3381 Seksyen 1, Bandar Butterworth, Daerah Seberang Perai Utara, Pulau Pinang ('the property').
- I** [2] According to the plaintiff, the defendant has no caveatable interest as required under the National Land Code such as to entitle them to lodge the caveat over the property. On the other hand the defendant maintains that the plaintiff does not have locus standi to make the application for removal of the caveat.

[3] At the outset, it should be noted that the plaintiff is not the registered owner of the property. This brings into sharp focus their locus standi to make this application for removal of the caveat under s 327 of the National Land Code and necessitates an examination of the plaintiff's nexus and/or rights or interests with respect to the property.

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[4] The plaintiff's response to the defendant's challenge is that they have the requisite locus standi to make this application for the removal of the caveat as they are a party to a sale and purchase agreement dated 17 July 2012 wherein they had purchased the property from the registered owners, namely, Lim Yun Cheow @ Lim Jun Chieow, Tan Ah How, Lim Lih Chee, Lim Lih Fong and Lim Ee Hsin ('the vendors'). (see exh TYK1 annexed to the affidavit of Tang Yin Kham affirmed on 9 January 2013 (encl 2)).

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[5] According to the plaintiff they have made full payment of the purchase consideration for the purchase of the property and are awaiting the transfer of the property into their names but are unable to do so due to the presence of the caveat.

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[6] Save for the sum of RM96,291 which has become the bone of contention between the plaintiff and defendant (which I shall describe as 'the impugned sum' and dealt with elsewhere in the judgment), it seems that the entire purchase consideration under the sale and purchase agreement dated 17 July 2012 has been paid by the plaintiff to the vendors. It is common ground that the impugned sum formed part of the payment to make up the full purchase consideration that was made by the plaintiff to the vendors.

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[7] In so far as knowledge of the caveat by the plaintiff was concerned, it is material to note that item 5 of the first schedule of the sale and purchase agreement dated 17 July 2012 expressly acknowledges the existence of the caveat.

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[8] As such, prior to the execution of the sale and purchase agreement dated 17 July 2012, the plaintiff as the purchaser of the property knew that the caveat was (or at any rate would be) an impediment to the completion of the sale and that the transfer of the property into their names as purchaser would be stultified, unless the caveat was removed.

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[9] The defendant maintained that the plaintiff lacked locus standi as they (the plaintiff) had entered into the sale and purchase agreement dated 17 July 2012 with the registered owners of the property, with knowledge of the existence of the caveat and further, without the knowledge of the defendant and/or their consent, utilised the impugned sum which the defendant had paid pursuant to an earlier sale and purchase agreement which the defendant had

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A with the original owners of the property. According to the defendant, the plaintiff had wrongfully (meaning without the defendant's consent) utilised the impugned sum which the defendant had previously paid and used it as part of the full purchase consideration payable by the plaintiff under the sale and purchase agreement dated 17 July 2012.

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[10] From the documents adduced in the various affidavits, it is clear that the impugned sum did form part of the full purchase consideration which was paid to the vendors under the sale and purchase agreement dated 17 July 2012. However, the plaintiff maintained that they could do so as the impugned sum did not belong to the defendant and was theirs all along.

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[11] On the other hand, the defendant maintained that the impugned sum was theirs all along as they had taken a friendly loan from a director of the plaintiff and used it as payment of a deposit under a sale and purchase agreement which they had with the original owners of the property and the plaintiff could not utilise the impugned sum which was at all times kept by the firm of solicitors who had initially acted for the original owners and later, after the death of one of the co-owners of the property, for the vendors.

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THE PLAINTIFF'S LOCUS STANDI

[12] It is my considered opinion that the suggestion by the defendant that the plaintiff's knowledge of the existence of the caveat impugns their capacity or legal standing to remove the caveat, is patently a non-starter, because if the plaintiff are able to convince the court that in law, they meet the criteria and thereby qualify or are entitled to make this application, then it matters not that they knew of the caveat and yet went ahead with sale and purchase agreement with the vendors.

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[13] As a fact, the documents indisputably show that the plaintiff knew that the caveat was in existence. Therefore the conduct of the plaintiff in going ahead with the sale and purchase agreement dated 17 July 2012 with knowledge of the existence of the caveat only demonstrates that they took a calculated risk that the transfer of the tile into their names may not take place if the caveat is not removed.

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[14] It was clear to me that the plaintiff's locus standi arose out of their status as a party to the sale and purchase agreement dated 17 July 2012 and had paid the full purchase consideration under that agreement and were not able to have the title to the property into their name due to the presence of the caveat. It was obvious enough that the plaintiff was therefore aggrieved or adversely affected by the existence of the caveat and were in my view, qualified to invoke s 327 of

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the National Land Code which stipulates that only a person aggrieved by the existence of the caveat may apply to have it removed.

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[15] The concept of person aggrieved was elucidated by the Court of Appeal in *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487, and defined as follows:

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To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body.

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[16] In my view, the factual substratum in support of the plaintiffs locus standi is firstly, that the plaintiff had a valid sale and purchase agreement with the registered owners and secondly, that they have averred in their affidavit that, '... all the procedures and terms for the purchase of the said property has been perfectly executed by the plaintiff including the payment of the purchase price but the plaintiff could not register its name into the title of the said property due to the said caveat which has been wrongly entered by the defendant'.

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[17] The factual substratum as above, which was relied upon by the plaintiff was sufficient to satisfy the test as enunciated in *Wu Shu Chen*, and I was accordingly impelled to the view that the plaintiff as the purchaser under the sale and purchase agreement 17 July 2012 and who had made full payment and merely awaiting transfer of the property into its name, was eminently a person aggrieved by the existence of the caveat for the purposes of s 327(1) of the National Land Code and were therefore entitled or qualified to make the present application for removal of the caveat.

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[18] Further, even if it is true that the plaintiff had wrongfully utilized the impugned sum which was (allegedly) paid by the defendant under an earlier sale and purchase agreement with the original owners of the property, that in and of itself does not diminish or extinguish the plaintiff's status as a party aggrieved or adversely affected by the presence of the caveat. As such, I rejected the defendant's objection.

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THE DEFENDANT'S (CAVEATOR'S) BURDEN

[19] With the disposal of the defendant's objection and consequent upon my ruling that the plaintiff was a party adversely affected or aggrieved by the existence of the caveat, the burden then shifted to the defendant (as the caveator) to demonstrate to the satisfaction of the court that the caveat should remain on the register.

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- A [20] In order to do that the defendant had to satisfy the court, on a balance of probabilities, that they have a caveatable interest, and that there are serious issues to be tried and finally that the balance of convenience favoured the retention of the caveat on the register.
- B [21] Essentially what was required of the defendant was that they had to fulfil the three staged test as enunciated by the Court of Appeal in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 at pp 741–743. In that case Gopal Sri Ram JCA (as he then was) had postulated as follows:
- C ... a private caveat may be entered at the instance of any person or body who claims either: 1) the title to land; or 2) any registrable interest in land ... it is only one who makes a claim to either of these in land may enter a private caveat.
- D In considering an application for the removal of a caveat, the procedure to be adopted should be simple and summary one. At the first stage, the court will examine the grounds expressed in the application for the caveat to see whether they show a caveatable interest. Once the court is satisfied that the caveator's claim amounts in law to a caveatable interest, it must then go on to consider whether the claim discloses a serious question meriting a trial. After these two stages have been
- E crossed, the court must decide where the balance of convenience lies.
- F [22] Thus, the threshold that the defendant had to cross was that they had to establish that they had a caveatable interest. For the purposes of determining whether a caveator has a caveatable interest, it is imperative, following *Luggage Distributors* that the statutory form and accompanying document that was filed by the caveator in lodging the caveat, be examined for its content in order to discern whether it discloses a caveatable interest.
- G [23] In the present case the defendant's statutory caveat entry form or *Borang* 19B and the accompanying documents as annexed to the plaintiff's affidavit affirmed by Tan Yin Kham on 9 January 2013 (encl 2) are relevant and calls for careful scrutiny. This was especially so since the plaintiff's counsel submitted that the defendant had 'admitted in the statutory declaration that it has no interest over the land'. I was taken aback by that submission as such an admission by the defendant, if made, would invariably be fatal to the entry of the caveat.
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- I [24] However, what I found, after reading the relevant documents, was that in the *Borang* 19B filed on behalf of the defendant, there is no such admission. This is what the defendant had stated (in the English version) as being the reasons for entry of the caveat.

As requested by the registered proprietors of all that piece of land known as Lot No 3381 held under GRN 39658, Section 1, Daerah Seberang Perai Utara, Bandar Butterworth, Pulau Pinang and measuring approximately 1,988 square metres (hereinafter referred as 'the said Land'), namely LIM YUN CHEOW @ LIM JUN CHIEOW (NRIC: No: 380213-07-5071/2190261) of No. 662, 2nd Floor, Bagan Ajam, 13000 Butterworth, Penang and LIM YUN KWONG (NRIC No: 400303-07-5273/1833732) (deceased) of 15-B Rangoon Road, 10400 Georgetown, Penang (hereinafter collectively referred to as 'the Vendors'), the Company paid a 10% deposit of Ringgit Malaysia Ninety Six Thousand Two Hundred and Ninety One (RM96,291) (hereinafter referred to as 'the Deposit') to the Vendors' Solicitor as stakeholders, pending the conclusion and finalisation of the terms of the sale and purchase agreement of the said Land (hereinafter referred to as 'the Agreement') on 10 March 2010.

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During the negotiation of the terms of the said Agreement, one of the registered owners of the said land, LIM YUN KWONG (NRIC No: 400303-07-5273/1833732) (deceased) passed away and after consultation with his beneficiaries, namely, TAN AH HOW (NRIC No 550528-02-5086/B8144961), LIM LIH CHEE (NRIC No 780828-07-65441), LIM LIH FONG (NRIC No 810124-07-5077) and LIM EE HSIN (NRIC No: 8303822-07-5224) all Malaysians citizen of 15-B Rangoon Road, 10400 Georgetown, Penang, LIM YUN CHEOW @ LIM JUN CHIEOW (NRIC No: 380213-07-5071/2190261) and the beneficiaries agreed to continue with the sale of the said Land and the Company agreed to continue with the purchase of the said Land.

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In view of the above, the Vendors' solicitors forwarded a revised draft of the said Agreement to our solicitors, Messrs. Ghazi & Lim of Wh Floor Unit 8, Wisma MPL, Jalan Raja Chulan, 50200 Kuala Lumpur on 4 May 2010 incorporation all the changes to reflect the deceased matter so that the parties can conclude the sale and purchase of the said Land and our solicitors replied with the proposed amendments to the draft said Agreement on 6th May 2010.

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Negotiation of the terms of the said Agreement continued, and on 25 May 2010, the Vendors' solicitors forwarded the amended draft of the said Agreement to our Solicitors, and we agreed to all the terms of the amended said Agreement forwarded by the Vendors' solicitors and instructed our Solicitors to write to the Vendors' solicitors on the following day of 26 May 2010 to inform that all the amendments in the said Agreement are acceptable to us and as such, the terms of the said Agreement are concluded and the said Agreement is ready for execution by the Vendors. Our solicitors also requested for the executed said Agreement to be returned to us immediately.

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We did not receive any reply from the Vendors nor their Solicitors thereafter, and our Solicitors had written to their Solicitors on several occasions to reiterate that *we are still waiting for the executed said Agreement as the terms of the said Agreement had been concluded and agreed by the parties.*

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Our solicitors were informed by the Vendors' Solicitors that the Vendors are not under any obligation to sell the said Land to the Company via its letter dated 22 July 2010. *The Company maintains that there is an agreement between the Company and the Vendors as all the material terms have been agreed upon by the parties. The Company*

A *still agrees to continue to purchase the said Land. In order to protect the interest and rights of the Company, we would like to apply to enter a private caveat on the said Land pending the said Agreement being executed by the Vendors and the said Land being registered into our name.* (Emphasis added.)

B [25] From the above, and despite the inelegant language employed in the
C *Borang* 19B, it was clear that the defendant had entered the caveat as a result of the stand taken by the beneficiaries of the estate of one Urn Yun Kwong (*whom I have described as one of the original owners*) in renegeing on the earlier agreement which had been concluded between the defendant and the original owners.

D [26] As far as the defendant was concerned, they had a valid and enforceable contract with the original owners, for the purchase of the property. It was after one of the original co-owners had died that the vendors (through the beneficiaries of one of the co-owners) had declared their intention not to go through with the sale that the caveat was entered by the defendant in order to protect the defendant's interest in the property arising out of and in connection with the sale and purchase agreement which the defendant had with the original owners of the property.

E [27] As such, there was no doubt in my mind that in the *Borang* 19B, the defendant was in fact positively asserting an interest in and over the property and were desirous of going ahead with the transaction which had been concluded with the original owners. To say that the defendant had admitted that they had no interest in the property is factually incorrect and the contents of the *Borang* 19B had effectively repudiated the plaintiff's submission to the effect that the defendant admitted that they had no interest over the property.

G [28] Having dealt with peripheral issues, we may now deal with the substance of the caveat removal application where the key issue was whether the interest that the defendant was seeking to protect by the caveat, was a registrable interest. It follows that if the defendant is not able to cross this threshold then the discussion goes no further and the caveat falls *in limine*.

H [29] In this regard, we know from previous case law that some interests can be readily categorised as interests that are capable of being construed as caveatable interests whilst others are not.

I [30] So for example, a pure monetary claim or claim in personam does not give rise to a caveatable interest. See *Kundang Lakes Country Club Bhd v Garden Masters (M) Sdn Bhd* [1999] 2 MLJ 537; [1999] 2 AMR 2420 (CA).

[31] Also, a mere chose in action arising out of or incidental to a contract for the sale of land does not entitle the claimant to lodge a caveat to freeze the land until his action had been heard. The caveator must have an 'interest in the land' in order to maintain the caveat. See *Million Group Credit Sdn Bhd v Lee Shoo Khoo & Ors* [1986] 1 MLJ 315.

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[32] In the present case, we are dealing with the interest of the defendant, who is a purchaser who had paid a deposit (ie the impugned sum) and was still desirous of going through with the sale but the vendor has declined to complete the sale or decided to hijack the transaction and sell the property to yet another purchaser.

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[33] The necessary starting point for an analysis of caveatable interests is s 323(1)(a) of the National Land Code. It provides as follows:

323 Applications for entry of private caveats.

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(1) The persons and bodies at whose instance a private caveat may be entered are (a) any person or body *claiming title to, or any registrable interest in*, any alienated land or undivided share in any alienated land or any right to such title or interest;... (Emphasis added)

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[34] Thus the defendant must be able to demonstrate that it falls squarely within the statutory parameter of s 323(1)(a) of the National Land Code in order to meet the threshold of establishing a caveatable interest. This necessarily involves an application of the principles that can be distilled from the following cases for the determination of a caveatable interest in any particular factual situation.

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[35] In *Jit Kaur v Parl Singh* [1974] 2 MLJ 199 it was said that:

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The test to be applied in regard to the respondent right to enter the caveat can be found also in S K Das, *supra*, at page 324 which reads as follows:

The primary test for a caveatable interest may be put on an alternative basis: is the right of the person lodging a caveat capable (i) of specific performance or (ii) of being protected by an interim injunction? 'The close analogy between injunctions and caveats, and the peculiar applicability of the remedy by injunction in the case of land under the Torrens system suggests that the true principle, which should govern the question whether an interest be caveatable or not, is that a caveat may be entered under circumstances which would justify an injunction being granted by the courts; at the same time it must be remembered that given the caveator's Interest a caveat may be entered as a matter of right under circumstances which might not call for the immediate intervention of the court'. Richmond, J. said to the caveator's counsel in *In re Kauri Timber Co.* 'You have not *jus in re*. The question is whether, because you might have an injunction against a sale, you may therefore lodge a caveat'.

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- A [36] A caveator must first satisfy the court that he has a caveatable interest in the land. See *Wong Kuan Tan v Gambut Development Sdn Bhd* [1984] 2 MLJ 113; [1984] 1 CLJ (Rep) 441.
- B [37] Under the National Land Code, whether or not a person or body has any caveatable interest must be determined with reference to s 323(1)(a), (b) or (c). (see *Score Options Sdn Bhd v Mexaland Development Sdn Bhd* [2012] 6 MLJ 475; [2012] 7 CLJ 802:
- C [38] In *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; [1995] 3 CLJ 520, Gopal Sri Ram JCA (as he then was) discussed what is meant by caveatable interest as distinguished from other interest in land. His Lordship said, inter alia:
- D The parameters of caveatability under s 323(1)(a) are therefore circumscribed by these words: 'title' and 'registrable interest'. It is only one who makes a claim to either of these in land may enter a private caveat
- E It is our considered view, therefore, that based on the provisions of the NLC and the authorities cited above, the only parties who are authorised to lodge a private caveat are those who may effect dealings in the particular interests in the land. Those parties may either have a claim to the title to the land or a claim to a registrable interest in the land or a claim to any right to such title or registrable interest.
- F Emphasis should be given to the words 'registrable interest' in s 323(1)(a) of the NLC. To be caveatable, the interest must be an interest in the land and that interest must be capable of registration. In short, it must represent a transaction that can ultimately lead to its registration on the register.
- G [39] Any claim of a right to lodge a caveat must be minutely inquired into in order to decide whether the caveat should remain or be removed see *Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd* [1992] 1 MLJ 263; [1992] 1 CLJ 150 (Rep); [1992] 1 CLJ 20.
- H [40] An application to lodge a private caveat must contain an assertion by the purchaser that there is a concluded contract for the sale and purchase of the land because there can be no claim to the title to registered land until and unless a purchaser has an enforceable contract for such sale. In *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782; [1995] 2 CLJ 545 the Court of Appeal found that the respondent had not made any assertion in his application that there was a concluded contract for the purchase and sale of the subject land. Thus, there was no caveatable interest.
- I [41] In *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53; [1976] 1 LNS 67 Raja Azlan Shah FJ (as His Highness then was) said:

In my view, the respondent had a contractual right under a contract of dealing in land which is a right of action against the vendor personally. That is a caveatable interest. There is statutory support for this view vide s 323(1)(a) of the National Land Code which appears wide enough to include any person claiming any right to title or interest in land.

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[42] Buhagiar J said in *Chin Cheng Hong v Hameed & Ors* [1954] 1 MLJ 169; [1954] 1 LNS 7:

This contractual right may be sufficient to give a person an 'interest' in the land for the purposes of protection by restrictive entry in the register; the claim to an interest in land arising out of the contract is sufficient to make it a caveatable interest and to support a caveat (*In re Registration of Caveat* [1908] Innes 114). The whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests and of interests that have not yet become actual interests in land, but a caveat, being in the nature of a statutory injunction, does not in itself make a claim or right either better or worse.

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[43] In *Mahadevan & Anor v Patel* [1975] 2 MLJ 207; [1975] 1 LNS 95 the late Suffian LP dealt with s 323(1)(a) of the National Land Code and observed as follows:

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... and as the principle is that it is not only a person who has a right to a registrable interest in land that may enter a caveat against the land, but it is any person claiming title to, or any registrable interest in, any alienated land or even claiming only a right to such title or registrable interest, who may enter a caveat.

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[44] And so the defendant's primary burden is to establish that they have a caveatable interest, that is, an interest that is capable of registration. Hence, in these caveat removal proceedings the defendant has to demonstrate that it has at the very least a prima facie case to seek the equitable relief of specific performance in respect of the interest which it is seeking to protect by the caveat.

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[45] From the case law as alluded to above, it appears that, generally speaking, a purchaser who has paid a deposit and who is desirous of going through with the transaction and finds that there is a risk that the sale may be scuttled due to the conduct of the vendor who has reneged on the agreement may enter a caveat provided the relevant statutory terms for entry of caveat contain a positive assertion that there is a concluded contract and asserts an interest in and over the land in question.

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[46] Of course, this is only a general statement and there may well be exceptions including those which are precipitated by the conduct of the caveator such as any express or implicit intimation subsequently that they are

- A** no longer desirous of going ahead with the transaction and seek a refund of deposit or monetary compensation, which would put in peril the caveat which had been entered earlier. See *Lim Ah Moi v AMS Periasamy all Suppiah Pillay* [1997] 3 MLJ 323 (CA) where the caveator had waived his rights with respect to any interest in the land because he had demanded for the refund of the deposit.
- B**

[47] It is now necessary to embark upon an examination of the factual matrix to determine whether the defendant has fulfilled the criteria for the retention of the caveat on the register.

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THE FACTUAL MATRIX

- D** [48] At all material times, the registered owners of the property were Lim Yun Cheow @ Lim Jun Chieow and Lim Yun Kwong. As will be seen from the narrative of the factual history of the relationship between the parties, Lim Yun Kwong died whilst one of the sale and purchase transactions involving the defendant was in progress.

- E** [49] For convenience and in order that the historical perspective of the transactions between the parties may be better understood, I have described Lim Yun Cheow @ Lim Jun Chieow and Lim Yun Kwong collectively as the 'original owners'. Also, for completeness, I should mention that Lim Yun Kwong's beneficiaries are Tan Ah How, Lim Lih Chee, Lim Lih Fong and Lim
- F** Ee Hsin, who, together with Lim Yun Cheow @ Lim Jun Chieow (previously described as vendors) subsequently entered into the sale and purchase agreement dated 17 July 2012 with the plaintiff.

- G** [50] In this matrix of facts it will be seen that there are in all, three sale and purchase agreements. First, there is the sale and purchase agreement dated 30 May 2008 ('the first SPA') between the defendant and the original owners. (see Exh LOK-3 annexed to the affidavit of Low Ooi Kok affirmed on 6 March 2013). The purchase price under the first SPA was RM1,069,900 and upon execution, the defendant paid RM106,990 being 10% deposit to the original
- H** owners, (see item 6 of the First Schedule to the first SPA). Messrs Ching Wei & Partners were the solicitors for the original owners.

- I** [51] However, the defendant was not able to pay the balance purchase price RM962,910 within the completion period and the 10% deposit of RM106,990 was forfeited by the original owners. I may add at this juncture there was no serious effort by the plaintiff to repudiate the existence of the first SPA although during submissions counsel for the plaintiff did make a cryptic (and I would add unsubstantiated) statement to the effect that 'all along the plaintiff was behind the purchase of the land'. The contemporaneous

documents did not back up such a statement and in the final analysis I found that that was merely weaved into the submissions without any cogent evidence to support it.

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[52] So, according to the documents as presented to the court, it appeared that the original owners were desirous of selling and did sell the property to the defendant for the stated price of RM1,069,900 under the first SPA. Next, it is not in dispute that the defendant did not pay the balance of purchase price within the time limit and the 10% deposit under the first SPA was forfeited by the original owners. However, the defendant was still interested in purchasing the same property and continued negotiations with the original owners.

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[53] In 2010, the original owners agreed to sell the property to the defendant at a purchase price of RM962,910. According to the defendant, the new purchase price of RM962,910 was agreed by both parties and was arrived at based on the first SPA in that the original owners had taken into consideration the 10% deposit of RM106,990 which had been forfeited by the vendors in 2008. Hence the first SPA had a direct bearing on the purchase price under the so-called 2010 draft agreement. According to the defendant, although the value of the property would have increased after a lapse of two years, in finalising the purchase price in 2010 at RM962,916 both parties took into consideration the sum of RM106,990 which had been forfeited. Hence, the purchase price under the 2010 draft agreement was in reality the original purchase price under the first SPA less the deposit of RM106,990 paid (and forfeited) thereunder, which gave a net sum of RM962,910.

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[54] Consequently, a draft sale and purchase agreement in 2010 was agreed by both parties and was about to be executed. The original owners requested the defendant to pay 10% deposit amounting to RM96,291 to their solicitors before the draft agreement agreed by both parties could be executed (see exh LOK2 encl 4). For ease of reference, I will refer to the 2010 draft agreement as the 'second SPA'.

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[55] According to the defendant, in order to make payment of the 10% deposit of RM96,291 to the original owners under the second SPA, the defendant had obtained a friendly loan amounting to RM96,291 from Madam Tang Yin Kham, who happened to be a director of the plaintiff. She issued her personal cheque for RM96,291 in the name of Messrs Ching Wei & Partners. Messrs Ghazi & Lim as solicitors for the defendant, forwarded the cheque dated 10 March 2010 amounting to RM96,291 to Messrs Ching Wei & Partners who accepted the 10% deposit RM96,291 by depositing the cheque into their client's account.

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[56] Of course, I am mindful that from the letters emanating from Messrs

- A** Ching Wei & Partners, there is a suggestion that they had accepted the cheque for the impugned sum only as stakeholders and upon the terms as set out in a letter dated 11 March 2010 from Messrs Ghazi & Lim, but that letter was not exhibited by either of the parties. At this juncture, I may add that there are several other letters that had been exchanged between Messrs Ghazi & Lim and
- B** Messrs Ching Wei & Partners which had not been exhibited. As I have not seen all the letters, I cannot say one way or the other whether if all the letters had been exhibited, the conclusion that I ultimately reached would be different.

- C** [57] To continue with the narrative, after the original owners' solicitors Messrs Ching Wei & Partners had accepted the 10% deposit RM96,291 and deposited the cheque into their client's account, Lim Yun Kwong (one of the original owners) passed away.

- D** [58] Then by letter dated 7 July 2010 (exh TYK 8 affidavit of Tang Yin Kham 18 March 2013) Messrs Ching Wei & Partners wrote to Messrs Ghazi & Lim purportedly returned the impugned sum by stating as follows,

We refer to the above, your letter of 26 May 2010 and have been instructed to inform you that our client have realised the following:

- E**
1. With the demise of Mr Lim Yun Kwong, they have yet to finalise the matters pertaining to his estate;and
 2. Are currently unable to locate the original issue document of title and are currently in the process of searching for the same.

- F** In the light of the above, we have been instructed to return the monies held by us as stakeholders pending the negotiation and finalization of the sale and purchase agreement pending the settlement of the above matters.

As such, we enclose our SCB cheque number 100061 for the sum of Ringgit Ninety Six thousand Two hundred and Ninety One Only (RM96,291) being the monies held by us as stakeholders ...

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- H** [59] However, the impugned sum never left the account of Messrs Ching Wei & Partners. At all material times the impugned sum was in the client account of Messrs Ching Wei and Partners. That much is clear from the letter dated first December 2011 from Messrs Ching Wei and Partners to Messrs Ghazi & Lim (see exh LOK 2 affidavit of Low Ooi Kok affirmed on 29 May 2013).

- I** [60] Whilst the children of the late Lim Yun Kwong were in the process of obtaining the small estate distribution order, Messrs Ching Wei & Partners wrote to Messrs Ghazi & Lim by letter dated 22th July 2010 stating that they were not under any obligation to sell the property to the defendant. See: exh TYK 8 affidavit of Tang Yin Kham affirmed on 18 March 2013 where it is stated that:

We are currently awaiting the return of the acknowledgement of our letter of 7 July 2010 which had been sent to you by post. Meanwhile, we would like to reiterate that pending a formal agreement for the sale and purchase of the Property, our client has not and is not under any obligation to sell the Property to your client and such is clearly the intention as highlighted in your letter of 11 March 2010 when you sent us the monies for us to hold as stakeholders. Further, it should be noted that our client would like all transactions to be smooth and as such are in the process of obtaining a replacement for the original of title which seems to have been misplaced ...

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[61] Apparently, Messrs Ghazi & Lim then advised the defendant that there is a valid enforceable contract between both parties and acting on that advise the caveat was entered by the defendant on 9 August 2010 to protect the defendant's interest in the said property. See Messrs Ghazi & Lim's letter dated 11 August 2010 addressed to the defendant in relation to the entry of the caveat on their behalf (exh LOK4 affidavit of Low Ooi Kok affirmed on 6 March 2013).

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[62] Then very much later, by letter dated 14 May 2012, Messrs Ching Wei & Partners wrote to Messrs Ghazi & Lim indicating that their client have obtained the relevant small estate distribution order and that they intend to sell the property for RM1.7m (see exh LOK3 affidavit of Low Ooi Kok affirmed on 29 May 2013). Messrs Ghazi & Lim responded by letter dated 17 May 2012 making a counter offer on behalf of 'their clients' to purchase the property for RM1.5m. Interestingly, in the caption of that letter from Messrs Ghazi & Lim, it is stated that the 'purchaser' is the defendant and its nominee is the plaintiff, Cendana Konsep Sdn Bhd (see exh LOK4 affidavit of Low Ooi Kok affirmed on 29 May 2013).

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[63] However, in the affidavit of Low Ooi Kok affirmed on 29 March 2013, at para 7, the defendant says that 'Defenden tidak memberi kebenaran kepada peguam kami pada masa itu untuk memberi 'counter offer' merupakan peguam penjual dan peguam tidak tahu peguam Tetuan Ghazi & Lim dapat arahan dari siapa untuk memberi surat 'counter offer' tersebut.' There is no credible or any explanation from the plaintiff as to the genesis of the counter-proposal made by Messrs Ghazi & Lim.

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[64] What surfaced next was the sale and purchase agreement dated 17 July 2012 wherein the plaintiff purchased the property from the registered owners, namely, Lim Yun Cheow @ Lim Jun Chieow, Tan Ah How, Lim Lih Chee, Lim Lih Fong and Lim Ee Hsin. I have previously described the registered owners as the vendors. I will describe the sale and purchase agreement dated 17 July 2012 as 'the third SPA'. The purchase price under the third SPA was RM1,500,000. The 10% deposit payable under the third SPA was RM150,000. The plaintiff

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- A apparently paid the deposit in the following manner. The impugned sum was utilised and formed part of the 10% deposit which was paid to the vendors under the third SPA. Thus, all that the plaintiff had to do was to top-up a sum of RM53,709 to make up the 10% of the purchase price ie RM150,000. This is not in dispute and it is in fact admitted by the plaintiff that they only paid the
- B top up of RM53,709. However, the plaintiff maintains that the defendant has no basis to complain as the defendant never paid any monies and that the impugned sum came from the plaintiff.
- C [65] Thereafter, Messrs Ghazi & Lim had by their letter dated 30 May 2012 to Messrs Ching Wei & Partners stated that they were enclosing a PBB cheque bearing No 625508 dated 23rd May 2012 for the sum of RM53,709 which belonged to the plaintiff. The cheque which was signed by two persons was the top-up for the balance of deposit of 10% amounting to RM150,000 for the
- D new purchase price of RM1,500,000.
- E [66] The plaintiff maintains that the impugned sum actually came from the plaintiff and at no time did the defendant make payment of that sum to the original owners. The point was made that the cheque for that amount was actually issued by Madam Tang Yin Kham, a director of the plaintiff. The defendant responded by stating that they took a friendly loan from Madam Tang Yin Kham.
- F [67] However, I note that the cheque which was issued by Madam Tang Yin Kham's was in fact a personal PBB cheque bearing No 553772 dated 10 March 2010 for RM96,291 and did not belong to the plaintiff. Further the cheque was only signed by one person, namely Madam Tang Yin Kham. Next, the plaintiff and Madam Tang Yin Kham are two separate legal entities. Lastly, according to the defendant, they had no dealings whatsoever with the plaintiff
- G in relation to the purchase of the said property.
- H [68] According to the defendant, at all material times they had a valid and enforceable contract which had been concluded in 2010 upon the acceptance of the defendant's offer to purchase the land and the payment of the impugned sum, which Messrs Ching Wei & Partners had acknowledged receipt of. Also, it was stated in the second SPA that the balance purchase price is RM866,619. This is found in the 'Definitions' at para 3.7 in pp 1 of 12 of the second SPA. The significance of this is that it is either express or tacit recognition or acknowledgement by the original owners (and their solicitors) that the
- I purchase price under the second SPA was RM962,910 and that the impugned sum had been paid, leaving a balance of purchase price of RM 866,619. Thus, it was not as if the defendant had only a draft agreement, but rather they had a valid agreement with all the material terms agreed upon and significantly that the impugned sum had been paid.

WHETHER THE DEFENDANT HAVE A VALID SALE AND PURCHASE AGREEMENT A

[69] The issue that arises in the context of the defendant's caveatable interest is whether the defendant had merely an inchoate agreement which was the subject of further negotiations or did it have a valid sale and purchase agreement upon which it could anchor or assert its claim to a registrable interest over the property and thereby crystallising a caveatable interest. B

[70] It is clear that all that had happened under the second SPA was that the deposit of 10% had been paid by the defendant (albeit by using a cheque issued by Madam Tang Yin Kham). Whilst it is tempting to conclude that an unexecuted agreement does not give rise to a valid contract, the position in law is that that is not necessarily so and much will depend on the facts and circumstances of each case and in particular the intention of the parties to the transaction and not insignificantly their contemporaneous conduct as well. Support for the proposition that an unexecuted agreement could give rise to a valid and enforceable contract is found in the decision of the Court of Appeal in *Sandrifarm Sdn Bhd v Pegawai Pemegang Harta Malaysia* [2000] 2 MLJ 535; [2002] 2 AMR 1556, where it was said: C D E

There are two issues to be decided. First and more importantly, *whether a valid contract has been formed between the parties even though a valid sale and purchase agreement had not been executed yet*. Secondly whether it is justifiable to refuse the appellant the reliefs sought for. F

In the circumstances of this case, we find no difficulty in holding that *a valid enforceable contract had materialized between the parties*. The offer to sell was made by the respondent and this offer was accepted by the appellant. In accordance with the terms of the sale, the appellant remitted the 10% deposit amounting to RM190,000 which amount was duly received by the respondent and they issued a receipt for it. Therefore, a valid enforceable contract had been formed. The *parties have been identified, the property, the price and the terms too have been identified with sufficient certainty. Such an agreement is enforceable as if it was embodied in a sale and purchase agreement*. Our finding is fortified by the decision in *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327. G H

[71] Of course, it is also true that, if all that the defendant had was a draft agreement then the defendant stands in a precarious position as a mere draft agreement is not capable of giving rise to a caveatable interest. See *Tan Leng Choo & Ors v Law Teck Huat* [2009] 1 MLJ 820 Court of Appeal. I

[72] In the submission, counsel for the plaintiff made the following points. First, he said that 'all along the plaintiff was the real buyer'. Then he said that the defendant was nothing more than a commission broker. Both of these

A submissions may well be true. But the documents do not support such a submission. The only way that that can be demonstrated is by way of a witness action involving viva-voce evidence.

B [73] Next, it was submitted by counsel for the plaintiff is that the second SPA (exh LOK2 of the defendant's affidavit in reply dated 6 March 2013) was merely a draft SPA with the defendant or its nominee as would-be purchaser and the facts clearly show the plaintiff's director Madam Tang Yin Kham to have had personally issued out her personal cheque for the sum of RM 96,291 in favour of the vendors' solicitor.

C [74] In so far as the second and third SPA's were concerned, it was submitted that no monies had been paid by the defendant towards the intended purchase. In the present case, counsel for the plaintiff referred to various correspondence between solicitors for the vendors and the plaintiff as well as proof of payment by the plaintiff which would be pivotal to show that the plaintiff had never utilised the defendant's forfeited monies from the first SPA towards the purchase of the said property through the third SPA. Counsel referred to the plaintiff's final affidavit and the exhibits thereto which shows a cheque for the balance sum making up the 10% deposit for the third SPA. This cheque for the amount of RM53,709 was issued by the plaintiff in favour of Messrs Ching Wei & Partners. There is also evidence showing receipt of the balance purchase price of RM1.35m towards the purchase of the said property.

F [75] It was submitted for the plaintiff that the first SPA has nothing to do with the second and third SPA which ultimately saw the plaintiff paying full consideration of the purchase price for the said property. It was submitted therefore that there is not a single shred of evidence in favour of the defendant to maintain the existence of the caveat remaining on the said property since they had not at any time put forth monies towards the purchase of the said property nor entered the completed transaction as a purchaser.

G [76] The plaintiff's position is quite simply that it had entered into the third SPA with the vendors and that all the procedures and terms of the purchase of the property had been fulfilled by the plaintiff including full payment of the purchase sum. Confirmation of the receipt of full payment from the vendors' solicitors to the plaintiff's solicitors is apparent to prove that the plaintiff had made the payments. The parties had also duly executed the transfer Form 14A as far back as 23 July 2012 but that is now attracting penalty for late registration due to the defendant's caveat.

H [77] The plaintiff says that the first SPA is no longer enforceable and is null and void when the defendant could not come up with the balance purchase price. According to the plaintiff, there is no SPA between the vendors and the

defendant and no contract over the property which provides the defendant with an interest to lodge the said caveat.

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[78] Also it was submitted that the defendant's contention that the second SPA suffices as legal and binding contract is again somewhat inaccurate on the facts of the referred authorities and the facts of this case. It was submitted therefore that the defendant has no legal right nor locus standi to defend the proceedings nor any other rights to entitle it to lodge the said caveat over the said property since the plaintiff is and was at all material times the beneficial owner subject to the transfer being perfected.

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[79] Finally it submitted that if at all the defendant has any rights over the said property, it should have sought to enforce its said rights under law as early as 2010 but instead it chose to do nothing as in the case of an indolent litigant and by doing so is deemed to have acquiesced to the fact that it did not possess any rights over the said property following the termination of the first SPA.

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FINDINGS OF THE COURT

First issue: Whether the defendant had a caveatable interest?

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[80] From the narrative for the factual matrix, it is obvious that there was a draft sale and purchase agreement in 2010 (ie the second SPA) the terms of which had been agreed by both parties and was about to be or would have been executed if not for the untimely demise of Lim Yun Kwong. Indeed there is no evidence of any outstanding contractual terms that needed to be negotiated further. Of course, in their letters to Messrs Ghazi & Lim, Messrs Ching Wei & Partners seem to suggest that the sale and purchase agreement ('second SPA') was still subject to further negotiation and they were merely holding the impugned sum as 'stakeholders'.

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[81] To me, it is unclear as to what exactly was left to be negotiated vis-a-vis the second SPA. Also, it is significant that the defendant had complied with the request by original owners by paying the 10% deposit amounting to RM96,291 to the solicitors. Once the solicitors accepted the deposit of RM96,291 a valid and enforceable contract had materialised. It has been suggested that it was not accepted as deposit but rather that it was sent to Messrs Ching Wei & Partners to be held by them as stakeholder. I was not shown any letter by either of the parties as to the terms of any stakeholding. The issue of stakeholding is therefore at large.

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[82] Now, all things being equal and had Lim Yun Kwong not died, and if the purchaser (defendant) under the second SPA had failed to pay the balance of the purchase price of RM866,619 within the stipulated period, the original

A owners would have been entitled to forfeit the deposit and the second SPA would have come to an end. Here the original owners did not and could not forfeit the deposit of RM96,291 because of subsequent events ie the death of Lim Yun Kwong and his family were in the process of obtaining the small estate distribution order. Thus, the transaction appears to have been put on hold. Of course, there was an attempt to refund the deposit (the impugned sum) but the monies never left the account of the solicitors for the original owners.

C [83] After the death of Lim Yun Kwong, everything changed and the vendors subsequently offered to sell the property at the new purchase price of RM1,700,000.

D [84] There was no evidence of any misrepresentation or fraud when the purchase price was concluded at RM962,910 between the parties in 2010 in respect of the second SPA. Bearing in mind that there was certainty as to the identity of the parties, the property, the price as well as the terms and conditions of the sale, the 2010 agreement between defendant and the original owners (second SPA) is prima facie enforceable, notwithstanding that it had not been executed and was still labelled as a draft agreement. To my mind the label 'drafft' only goes to form and not to the substance.

F [85] Thus, based on the evidence presented in the affidavits and exhibits thereto, there is prima facie evidence of a valid and enforceable contract for the sale of the property to the defendant which entitled the defendant to lodge a caveat to protect their rights under the second SPA.

G [86] The next issue is whether by having just paid the deposit and not the full purchase consideration, the defendant has a caveatable interest in the said property. In *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53, it was held as follows:

H As regards the first question, section 323(1)(a) of the National Land Code provides that a private caveat may be entered at the instance of 'any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest.' It would seem clear that the respondent cannot claim title to or any registrable interest in the property in question merely on the strength of the sale agreement which is a non-statutory and non-registrable instrument, but it cannot be denied that he has a right under that agreement to such title or interest by bringing an action for specific performance of the agreement, which in fact he has already done.

I [87] In *Chin Cheng Hong v Hameed & Ors* [1954] 1 MLJ 169 Buhagiar J said at p 170:

The whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests and of interests that have not yet become actual interests in land, but a caveat, being in the nature of a statutory injunction, does not in itself make a claim or right either better or worse.

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It would seem abundantly clear from the authorities that, *so long as there is in existence a valid agreement for the sale of land, the purchaser is entitled to lodge a caveat to protect his rights under the contract and to sue for specific performance of the agreement* ...

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(Emphasis added.)

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[88] Hence, what is critical is that there should be a valid agreement for the sale of land and a purchaser's right to enter a caveat to protect his interest over the land is not predicated on him having paid the full purchase consideration. If payment of the full purchase consideration is the *sine qua non* for entry of a caveat by the purchaser then almost every conveyancing transaction would be in peril and the purchaser would be without statutory protection during the intervening period between execution of the agreement (and payment of deposit) and payment of full purchase consideration, which in most cases will be several months later.

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[89] In my view, it is clear that the defendant lodged the caveat pursuant to the second SPA and not the first SPA. Also, it is irrelevant for the plaintiff to connect the defendant to the third SPA, when that has nothing to do with the defendant. Whilst the second SPA may well be in draft form, there is to my mind, sufficient certainty as to the intention of the parties thereto, ie that the property was to be sold to the defendant for the sum of RM962,910 and the defendant had paid the 10% deposit of RM96,291 (albeit that the monies came by way of a friendly loan from Madam Tang Yin Kham, a director of the plaintiff).

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[90] As such, the defendant maintains they had a concluded agreement for the purchase of the property. To that end, they had paid a deposit, ie the impugned sum. Hence, effectively the defendant was taking the position that the draft agreement was by no means an inchoate document which required further negotiations and proposal/counter-proposals etc between the parties. I am inclined to agree with the defendant. There was certainty on all material terms, namely the parties, the property and the price. In any event, there was nothing to suggest that there was any or any significant terms or conditions that required further negotiation. If anything, it appeared that the old terms that were used under the first SPA were to apply to the second SPA. This is to be gathered from the handwritten note at p 5 of the second SPA which says, 'use back the old term'. Again, this is yet another aspect of the narrative that needs to be tested in a trial by way of viva-voce evidence.

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A [91] In any case, it is curious that a deposit would be paid if the agreement was merely a draft agreement. It should also be borne in mind that this was not the first contractual relationship between the defendant and the original owners but rather it was the second round of contractual dealing between the defendant and the original owners. As such, it would be necessary to have regard to the entire factual circumstances and the background instead of merely looking at the label and concluding without more, that this is a draft agreement so as to deprive it of any contractual force and validity. In the circumstances, it would be wrong to view the second SPA in isolation and merely treat it as a draft when the contemporaneous evidence suggests otherwise.

C [92] Thus, it seems more probable than not that the second SPA is the product or by product of the first SPA and was in pith and substance a consensual continuation of the first SPA with a seemingly new purchase price but was in effect the same purchase price as the first SPA so that although the 10% deposit had been forfeited by the original owners, it had in fact been taken into account vis-a-vis the second SPA although it was not specifically mentioned as such in the second SPA. According to the defendant, they complied with the original owner's request under the second SPA by paying the 10% deposit amounting to RM 96,291 through the defendant's conveyancing solicitors (Messrs Ghazi & Lim) to the solicitors for the original owners (Messrs Ching Wei & Partners).

F [93] Applying the principle in the *Sandrifarm's* case I am of the view that the defendant has established on a prima facie basis that there was at all material times a valid and concluded contract for the sale of the property as between the original owners and the defendant which I have described in this judgment as the second SPA.

G [94] The defendant is entitled to enforce the second SPA by seeking the relief of specific performance. Whether the defendant will succeed in obtaining specific performance is quite another thing altogether. But what is clear is that the defendant does not have the burden at this stage of proving that it will succeed in obtaining specific performance. See *Macon Engineering Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53 at p 58 where HRH Raja Azlan Shah FJ (as he then was) said:

I In my opinion *what the court at the present stage has to see is not that the caveator must ultimately succeed, but that he has a prima facie case, and that his claim is not baseless or frivolous.* In such circumstances the court will not summarily remove the caveat but will extend it until the hearing of the action.

(Emphasis added.)

[95] As such, I was satisfied that based on all the circumstances, the

defendant did have a caveatable interest over the property.

A

Second issue: serious issues to be tried

[96] As is apparent from the narrative under the heading 'factual matrix', that there were three agreements. The first SPA and the second SPA involve the defendant (as purchaser) whereas the third SPA involves the plaintiff (as purchaser). In my view the fact that the second SPA in fact in draft form does not detract from or diminish its validity as it is in pith and substance a concluded agreement for the sale of the property by the original owners to the defendant for the sale price of RM962,910 which was in turn arrived at based on the first SPA (ie purchase price under the first SPA less the 10% deposit of RM106,990 which had been forfeited by the vendors in 2008).

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[97] Hence the first SPA is inextricably connected to the 2010 draft agreement as regards the purchase price for the second SPA. What is critical is that pursuant to the second SPA, the original owners (as vendors) requested the defendant to pay 10% deposit amounting to RM96,291 to the vendor's solicitors before the draft agreement agreed by both parties could be executed. The deposit of RM96,291 was duly paid by the defendant to the vendor's solicitors through their own solicitors Messrs Ghazi & Lim.

D

E

[98] To my mind, the source of the 10% deposit is irrelevant to the issue of validity of the second SPA. Hence, it makes no difference that the monies came by way of a friendly loan from a director of the plaintiff. Most certainly the evidence does not show that it came from the plaintiff. If the plaintiff were behind the purchase all along then it is curious and intriguing that their name did not surface as purchasers right up to the time of the second SPA but only after the vendors offered to sell the property to the defendant for RM1.7m.

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[99] But the plaintiff on the other hand, were quite happy to buy the property for RM1.5m and so they went ahead concluded the third SPA and paid the full purchase price but at same time utilising the 10% deposit that was paid to the vendors solicitors by Messrs Ghazi & Lim. How the plaintiff came into the picture and became the ultimate purchasers has not been explained by the plaintiff.

H

[100] Of course, the role of Messrs Ghazi & Lim needs to be also examined with regards to the authorisation for utilisation of the sum of RM96,291 as they knew that that amount was the deposit that was tendered by the defendant under the second SPA. They knew or ought to have known that, irrespective of where the monies came from, prima facie, the impugned sum belonged to the defendant.

I

- A [101] In this regard, the defendant had expressly acknowledged that they took a friendly loan from Madam Tang Yin Kham and they were indebted to her to the extent of the impugned sum. Also in this regard, I am mindful of the fact that Messrs Ghazi & Lim have not had the opportunity of rendering their explanation, if any, for their role in respect of the second and third SPAs and the manner in which the impugned sum came to be utilised as part of the purchase consideration under the third SPA and how the name of the plaintiff came to be included in their letter dated 17 May 2012 (see exh LOK4 affidavit of Low Ooi Kok affirmed on 29 May 2013).
- B
- C [102] On the issue of the payment of the impugned sum under the second SPA, it is necessary to consider the following averments by the parties. First, Low Ooi Kok (on behalf of the defendant) had in his affidavit affirmed on 6 March 2013 (encl 4) stated in paras 3 and 5 as follows:
- D Saya sesungguhnya menyatakan bahawa Syarikat Defendan telah membayar 10% sebagai deposit kepada Peguam milik hartanah tersebut melalui Peguam kami pada masa itu iaitu Tetuan Ghazi & Lim (Peguambela & Peguamcara) di alamat Tingkat 12, Unit 8, Wisma MPL, Jalan Raja Chulan, 5200 Kuala Lumpur. Kami kepilkan salinan cek (Public Bank No: 553772) yang diterima oleh Peguam pemilik iaitu
- E Tetuan Ching Wei & Partners (Pegumbela & Peguamcara) di alamat Suite 509, Blok A, Glomac Business Centre, Number 10 Jalan SS6/1, Kelana Jaya, 47301 Selangor Darul Ehsan, diakui terima oleh Peguam pemilik tersebut Sesalinan cek tersebut dan pengakuan penerimaan dan surat dari Tetuan Ching Wei & Partners kepada Tetuan Ghazi & Lim bertarikh 1/12/2011 dilampirkan dan ditanda sebagai Ekshibit 'LOK-1'.
- F
- [103] Then Madam Tan Yin Kham in her affidavit affirmed on (18 March 2013 encl 5) rebutted Low Ooi Kok's averment by stating in para 6 as follows:
- G Paragraph 3 of the said affidavit in reply is clearly misleading the court as the cheque marked as exhibit 'LOK1' is in fact my personal cheque from my account held with Public Bank Berhad at its branch in Jalan Raja Uda Butterworth as proved through a letter by Public Bank Berhad dated 13 March 2013 which I am attaching together herein.
- H
- [104] Then, in his affidavit affirmed on 29 May 2013 Low Ooi Kok on behalf of the defendant, stated in paragraph as follows, 'Saya merujuk kepada perenggan 6 dalam affidavit balasan plaintiff kepada affidavit jawapan defendan dan menafikan dan menyatakan bahawa jumlah tersebut adalah pinjaman (Friendly Loan) kepada defendan dan mengaku bahawa mereka berhutang RM96,291 kepada Tang Yin Kham *dan defendan berhak menggunakan pinjaman tersebut untuk membeli hartanah tersebut* dan Tang Yin Kham menulis cek tersebut atas nama Tetuan Ching Wei & Partners, Peguamcara untuk penjual hartanah bagi maksud tersebut.'
- I

[105] Also in the affidavit affirmed by Low Ooi Kok on 1 July 2013 (encl 7), the deponent has stated that:

Saya sesungguhnya menyatakan bahawa Syarikat Defendan tidak pernah membenarkan Tetuan Ghazi & Lim (Peguambela & Peguamcara) dialamat Tingkat 12, Unit 8, Wisma MPLJalan Raja Chulan, 50200 Kuala Lumpur atau Plaintiff untuk menggunakan 10% RM96,291 yang dibayar melalui cek (Public Bank No: 553772) sebagai deposit kepada tetuan Ching Wei & Partners untuk urusan transaksi yang lain atau pun Perjanjian Jual Beli bertarikh 17/07/2012 tersebut oleh Tetuan Ghazi & Lim dan dengan ini saya kepilkan surat bertarikh 30/05/2012 oleh Tetuan Ghazi & Lim kepada Ching Wei & Partners berhubung dengan isu menggunakan 10% deposit RM96,291.00 yang dibayar oleh Defendan melalui cek (Public Bank No: 55377) sebagai balasan sebahagian deposit kepada Tetuan ChingWei & Partners dalam Perjanjian Jual Bli bertarikh 17/07/2012 dan dieksibitkan sebagai 'Lok 1' ...

[106] However, there was no response by way of an affidavit in reply from the plaintiff to repudiate and credibly deny the abovementioned averments by Low Ooi Kok in relation to the impugned sum and as to the scope of authority of Messrs Ghazi & Lim. It is material to note that the final affidavit which was filed in this proceedings was an affidavit by the plaintiff ie affidavit of Tang Yin Kham affirmed on 31 July 2013 which was filed without leave of court and was done after submissions had been tendered. Nevertheless, the defendant's counsel took no objection to it. In the circumstances, that affidavit by the plaintiff was admitted. What was significant was the absence of any averment therein by the plaintiff to repudiate the matters that were stated by the defendant in relation to the impugned sum being a friendly loan and/or as to its utilization for any other transaction. As such, applying the principle in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, the defendant's averment stands uncontradicted and must be accepted.

[107] Also, it is interesting and significant that in the submissions the point was made by counsel for the plaintiff that 'all along the plaintiff was the real buyer' and that, 'at best the defendant is an unregistered broker seeking to lay claim or profit from their entry of caveat over the bona fide transaction for value which now cannot be registered for reason of the said caveat over the said property.' To my mind what this does is that it adds flavour to the admixture of truth and falsity and further shrouds the matrix of facts with mystery which can only be unravelled at a full trial in order to get to the truth of the matter.

[108] Presently, I can say quite confidently, that nothing is so clear cut that I can in these proceedings jettison the caveat on the basis that the defendant is a mere broker (as contended by the plaintiff) and deprive them of the protection of the caveat. To conclude the point, I am of the view that this case is littered with serious issues to be tried in relation to the defendants interest in

- A** and over the property. To recapitulate, it is my finding that there are serious questions or issues to be tried in relation to the following, which must necessarily be ventilated and tested at a trial by viva-voce evidence.
- B** (a) is the first SPA connected to the second SPA ie in the sense that the deposit that was forfeited under the first SPA was taken into account in arriving at the price for the purposes of the second SPA?
- (b) was the second SPA a mere draft (which was to be further negotiated) or did it represent a concluded contract?
- C** (c) if the second SPA was to be further negotiated, then what are the terms that were still outstanding and which had to be further negotiated?
- (d) was the plaintiff 'standing behind the first and the second SPAs' and the 'real buyer' all along?
- D** (e) was the impugned sum that was paid by way of personal cheque that was issued by Madam Tang Yin Kham, a director of the plaintiff, given by way of 'friendly loan' to the defendant or was it meant as payment for and on behalf of the plaintiff?
- E** (f) with respect to the first and the second SPAs, was the defendant merely a unregistered commissioned broker all along and therefore not the real buyer?
- (g) what were the circumstances relating to the appointment of Messrs Ghazi & Lim and in evolving from solicitors for the defendant to later becoming solicitors for the plaintiff?
- F** (h) did Messrs Ghazi & Lim consult the defendant before issuing the letter dated 17 May 2012 wherein they made the 'counter-proposal' that the 'purchasers' were willing to purchase the property for RM1.5m?
- G** (i) since Messrs Ghazi & Lim had entered the caveat for an on behalf the defendant, they must have known of the defendant's interest in and over the property. As such, did Messrs Ghazi & Lim receive instructions from the defendant that they (the defendant) were no longer interested in purchasing the property?
- H** (j) since Messrs Ghazi & Lim had entered the caveat for an on behalf the defendant, they must have known of the defendant's interest in and over the property. As such, did Messrs Ghazi & Lim receive instructions from the defendant that they (the defendant) were no longer interested in purchasing the property?
- I** sum was always with Messrs Ching Wei & Partners. Did Messrs Ghazi & Lim obtain the defendant's instructions or their consent that the impugned sum could be used by the plaintiff for the purposes of making up the purchase consideration under the third SPA?

- (k) whether the impugned sum was paid to Ching Wei & Partners as stakeholders? A
- (l) if the impugned sum was paid to Ching Wei & Partners, then what are the terms of the stakeholding? B

Third issue: Whether the balance of convenience favours the retention or removal of the caveat?

[109] Most certainly if the caveat is removed, then the property will be forever lost to the defendant and they would have to abandon their claim against the vendors for specific performance. C

[110] Also, and as I mentioned at the very outset of this judgment, the caveat was on the register at the time when the third SPA was entered into. As such, the plaintiff knew (as reflected in item 5 of the First Schedule to the third SPA) that the defendant was asserting a claim over the property arising out of an agreement which they had with the original owners. D

[111] Thus, by the caveat, they were put on notice of the potential hurdles that they would face if they were to proceed with any transaction with the vendors. Put simply, they took the risk of going ahead with the third SPA despite knowing that there was a caveat in place which was an encumbrance. E

[112] At the time when I had formulated my decision, I was unaware that the defendant had filed a suit against the registered owners of the property (the vendors) for specific performance and damages etc. The suit itself was filed after I had heard submissions and reserved the matter for delivery of decision. On the date when I delivered the decision, I was informed by the defendant's counsel that the suit had been filed and registered as Penang High Court Suit No 22NCVC-250-XX of 2013. F

[113] Indeed if the defendant had not filed suit as at the date of this decision, I would have directed them to file a suit for specific performance within a particular time period. Such an approach would not have been heretical. There is precedent for such an order. In *Jit Kaur v Parl Singh* the court declined to remove the respondent's caveat but as no suit had been filed by the respondent/caveator, the court ordered that the caveat do remain on the register and that the respondent do file suit accordingly. In that case the court said at p 201 of the judgment: G

I

- A Section 327(1) of the National Land Code empowers the court to make such order as it may think just. In an application of this nature the learned author of the *Torrens System in Malaya* said at page 347–348 of his book as follows:
- B In dealing with applications for the extension of the operation of or for the removal of caveats against dealings with land it has always been the desire of the court to allow the parties the fullest opportunity to litigate any matter that may be in dispute between them. The court is loath to prevent parties litigating any right that they think they may possess: In *re Caveat of Lewis* (1903) 23 NZLR SC 581. Where there is a conflict of testimony the caveat will not be discharged.
- C On the facts and circumstances of this case therefore I dismissed the application to remove the caveat and further ordered the respondent to file the main action within six months from the date of the order.
- D [114] As it turned out, such a consequential order became unnecessary in the present case as the defendant had in fact filed a suit before a decision could be delivered. The filing of the suit showed the seriousness of the defendant in wanting to assert its rights and interest over the property and ultimately it doubled the desirability of retaining the caveat pending disposal of the suit that had been filed by the defendant. Of course, the defendant's failure to act timeously and file a suit for specific performance would have ordinarily been fatal (see *Institut Teknologi Federal Sdn Bhd v IIUM Education Sdn Bhd* [2007] 7 MLJ 23; *Jasalam (M) Sdn Bhd v Wong Koon Yee* [2000] 3 MLJ 115; *Paya Terubong Estates Sdn Bhd v Pusaka Warisan Sdn Bhd* [1998] 2 MLJ 463).
- F [115] But, in this case, there is evidence that after the death of one of the co-owners, the transaction as relates to the second SPA went cold. Hence, there were extenuating circumstances to warrant the exercise of discretion to excuse the defendant for their inaction. In any event, they had filed the suit as at the date of the decision. Hence, the issue of non-filing of the suit became moot.
- G
- H [116] I was shown a copy of the writ. The plaintiff was not named as a party to the suit. I therefore directed the defendant to serve a copy of the writ on the plaintiff's solicitors so that their client could, if they so desired, intervene or take such other steps as may be necessary to protect their interest in the matter. Of course, I am mindful of the fact that the plaintiff have or appear to have paid the full purchase price and are only awaiting the transfer of the property and any delay in completion of the transfer will have pecuniary implications by way of stamp duty penalty payments, but for the reasons as set out above, I considered these to be self-induced situations as the plaintiff knew (or ought to have known) that they were taking a risk by going ahead with the third SPA despite knowledge of the caveat. Hence, I took the view that these pecuniary implications to the plaintiff were not of themselves persuasive to tilt the balance in favour of caveat removal.
- I

[117] Ultimately, I was of the view that based on the facts and circumstances as alluded to above, it would have unfair to the defendant and inequitable if the caveat were to be removed and that the balance of convenience favoured the retention of the caveat rather than its removal.

A

THE OUTCOME AND THE ORDER

B

[118] As such, it was my judgment that the defendant had met all the criteria for the retention of the caveat and accordingly the plaintiff's application to remove the defendant's caveat was dismissed with costs of RM5,000 to be paid by the plaintiff to the defendant.

C

Order accordingly.

Application dismissed with costs of RM5,000.

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Reported by Afiq Mohamad Noor

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